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# Living Apart Without Cohabitation as a Ground for Divorce under Kentucky Law

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other, and is more than negligence, more than gross negligence, and is such conduct as indicates a reckless disregard of the just rights or safety of others." In *People v. Adams*,<sup>21</sup> the court said: "Wanton negligence implies a positive disregard of the rules of diligence and a reckless heedlessness of consequences." Willful negligence may be defined as "such conduct as evidences a reckless indifference to safety."<sup>22</sup> So we may conclude that willful and wanton disregard is synonymous with the reckless disregard spoken of by the courts in our third class of cases.

Gross negligence is the "omission of that care which even inattentive and thoughtless men never fail to exercise."<sup>23</sup> The court in *People v. Adams*<sup>24</sup> tells us that "gross negligence borders on recklessness." In a civil case, *Craig v. McAtee*,<sup>25</sup> the court said that gross negligence does not establish a rule of liability varying appreciably from reckless disregard.

All of these definitions, while they are phrased differently, seem to have at least one point in common: that to constitute criminal negligence, an act or omission must be evidence of a reckless disregard of consequences which will result from such act or omission.

Realizing that a one sentence definition, to be of any use, must be very broad, in order to cover all circumstances, it is with a great deal of hesitation that we submit for criticism the following definition, because in our effort to make the definition broad we may have exceeded the limit and made it too broad. However, with all the definitions and explanations which have been discussed above in mind, we submit the following, which we consider to be a workable definition for criminal negligence: *Criminal Negligence is abnormally dangerous conduct of such a nature as to indicate under all the circumstances, a reckless disregard for human life and safety.* We believe that this definition embodies all of the characteristics of criminal negligence set out in the cases which we have considered.

The adoption of a definition similar to the one proposed, would be valuable not only in promoting a greater uniformity of decisions, but also in providing a standard part of the court's instructions to the jury. This would make for fewer reversals on appeal because of erroneous instructions.

PHILIP SCHIFF.

#### LIVING APART WITHOUT COHABITATION AS A GROUND FOR DIVORCE UNDER KENTUCKY LAW

Carroll's Kentucky Statutes<sup>1</sup> provides that, "Living apart without any cohabitation for five years next before application" is ground for divorce "... to both husband and wife". A similar provision is found in

<sup>21</sup> Supra, n. 5.

<sup>22</sup> Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42 (1928).

<sup>23</sup> Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934 (1857).

<sup>24</sup> Supra, n. 5.

<sup>25</sup> 160 Wash. 337, 295 Pac. 146 (1931).

the statutes of Louisiana,<sup>2</sup> North Carolina,<sup>3</sup> Rhode Island,<sup>4</sup> Texas,<sup>5</sup> Washington,<sup>6</sup> and Wisconsin.<sup>7</sup> Such a provision is not to be confused with statutes making desertion a ground for divorce.<sup>8</sup>

Statutes such as this would seem to be based upon the proposition that where a husband and wife have lived apart for a long period of time without any intention to resume conjugal relations, the best interests of society and the parties will be promoted by a dissolution.<sup>9</sup>

Living apart without cohabitation for five years next before application entitles a spouse who has deserted the other to a divorce.<sup>10</sup> The complaining spouse may secure a divorce under this statute irrespective of his or her fault.<sup>11</sup>

This statute does not make living apart without cohabitation for five years next before application, an absolute ground for divorce.<sup>12</sup>

A divorce will not be granted on the ground of living apart for five consecutive years next before application, if one of the parties was insane during this period.<sup>13</sup> Where one spouse is permanently insane and confined in an institution, the court, in denying a divorce to the sane spouse where suit was brought under this statute, has said that the defendant must have actively or passively contributed to the separation,<sup>14</sup> and that "the statute assumes that the parties have lived separate because of their mutual purpose to do so, or because one so determined and the other acquiesced."<sup>15</sup> But if the parties had lived separate without cohabitation for five years before the insanity occurred, the subsequent insanity will not bar the divorce.<sup>16</sup>

<sup>1</sup> (1936) section 2117.

<sup>2</sup> Louisiana Act 269 of 1916.

<sup>3</sup> North Carolina Code (1927) section 1659.

<sup>4</sup> G. L. Rhode Island (1923) section 4214.

<sup>5</sup> Texas Statutes (Vernon, 1936) article 4629.

<sup>6</sup> Washington Code (Pierce, 1929) section 7501.

<sup>7</sup> Wisconsin Statutes (1929) section 247.07.

<sup>8</sup> Table of such statutes, Vernier, *American Family Law*, (1932) section 67.

<sup>9</sup> *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178, 180 (1913); *Camire v. Camire*, 43 R. I. 489, 113 Atl. 748 (1921).

<sup>10</sup> *Hall v. Hall*, 102 Ky. 297, 43 S. W. 429 (1897); *Boreing v. Boreing*, 114 Ky. 522, 71 S. W. 431 (1903).

<sup>11</sup> *Parker v. Parker*, 31 Ky. L. Rep. 1228, 104 S. W. 1028 (1907); *Ward v. Ward*, 213 Ky. 606, 281 S. W. 801 (1926); *Best v. Best*, 218 Ky. 648, 291 S. W. 1032 (1927). *Contra*: *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921); *Pierce v. Pierce*, 120 Wash. 411, 208 Pac. 49 (1922); *Jakubke v. Jakubke*, 125 Wis. 635, 104 N. W. 704 (1905).

<sup>12</sup> *Messick v. Messick*, 177 Ky. 337, 339, 179 S. W. 792 (1917).

<sup>13</sup> *Messick v. Messick*, 177 Ky. 337, 179 S. W. 792 (1917); *Ferguson v. Ferguson*, 8 Ky. L. Rep. 428 (1886); *Pile v. Pile*, 94 Ky. 308 (1893); *Camire v. Camire*, 43 R. I. 489, 113 Atl. 748 (1921).

<sup>14</sup> *Ferguson v. Ferguson*, 8 Ky. L. Rep. 428 (1886); *Messick v. Messick*, 177 Ky. 337, 339, 179 S. W. 792, 793 (1917).

<sup>15</sup> *Ferguson v. Ferguson*, 8 Ky. L. Rep. 428 (1886); cf. *Goudeau v. Goudeau*, 146 La. 742, 84 So. 39 (1920).

<sup>16</sup> *Andrews v. Andrews*, 120 Ky. 718, 87 S. W. 1080, *affd.* 90 S. W. 581 (1905).

Where the parties have lived apart for five years, a divorce has been denied the husband on the ground the wife had had no notice of the husband's intention to cease to live with her.<sup>17</sup> However, absence of the husband in prison will not prevent a divorce under this statute.<sup>18</sup>

The cases are not clear as to whether "living apart" may be *constructive* so as to grant a divorce under this statute where the parties are actually living in the same house. In *Quinn v. Brown*,<sup>19</sup> the Louisiana Court has said that the "living apart" must be such that the neighborhood may see that they are not living together.<sup>20</sup> The Kentucky Court in *Gates v. Gates*<sup>21</sup> denied a divorce on the ground of living apart without cohabitation for five years, where the parties had continued to reside in the same house and had held themselves out as man and wife, but where there had been no sexual intercourse between them for over five years. In this case the court said, "sexual intercourse is not all that is embraced in the legal phrase 'living and cohabitation together as husband and wife'".<sup>22</sup> The case of *Evans v. Evans*<sup>23</sup> must be noticed in connection with the holding in *Gates v. Gates*. In *Evans v. Evans* the parties continued to reside in the same house but the wife had arbitrarily refused sexual intercourse for over five years. A divorce was granted to the husband on his petition which alleged an unjustified abandonment by the wife and cessation of cohabitation for more than five years. The Kentucky Statutes<sup>24</sup> provides for a divorce to the party not in fault for "abandonment by one party or the other for one year". The Kentucky Court holds that arbitrary refusal of sexual intercourse is sufficient abandonment to grant a divorce under this statute;<sup>25</sup> and although it appears that the ground relied upon for the divorce in *Evans v. Evans* was living apart without cohabitation for five consecutive years, the petition was probably sufficiently broad to permit the decision to be placed on this ground, or, on the ground of abandonment by one party or the other for one year. However, it is not clear on which provision of the statute the case is rested, both provisions apparently being considered as sufficient to grant the divorce in this situation.

Our court holds that if both parties are in fault, a divorce will be denied where both petition and cross-petition alleges an abandonment

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<sup>17</sup> *Stevens v. Stevens*, 123 Ky. 545, 96 S. W. 811, 29 Ky. L. Rep. 953 (1906) (wife thought husband would return after finding work). But cf. *Davis v. Davis*, 102 Ky. 440, 43 S. W. 168, 19 Ky. L. Rep. 152 (1897).

<sup>18</sup> Accord: *Davis v. Davis*, 102 Ky. 440, 43 S. W. 168, 19 Ky. Law Rep. 1520 (1897).

<sup>19</sup> 159 La. 570, 105 So. 624 (1925).

<sup>20</sup> *Id.* at 571, 105 So. at 625.

<sup>21</sup> 192 Ky. 253, 232 S. W. 378 (1921).

<sup>22</sup> *Id.* at 255, 232 S. W. at 378.

<sup>23</sup> 247 Ky. 1, 56 S. W. (2d) 547 (1933).

<sup>24</sup> (Carroll, 1936) section 2117, paragraph 2, subsection 2.

<sup>25</sup> Accord: *Evans v. Evans*, 93 Ky. 516, 20 S. W. 605 (1892). See *Axton v. Axton*, (Ky.) 206 S. W. 480 (1918).

by the other party for more than one year.<sup>27</sup> Query: If both parties are in fault in the sexual separation, and this condition continues for five years, should a divorce not be granted on the ground of living apart without cohabitation although the parties may have resided in this same house during that period?<sup>28</sup>

"Living apart without cohabitation for five consecutive years next before application"<sup>29</sup> is ground for divorce in the following situations:

1. Where either party has deserted the other and lived apart for five years, irrespective of who was at fault in the separation.<sup>30</sup>

2. Where the parties have lived apart for five consecutive years because one of them was confined in prison.<sup>31</sup>

This statute is not ground for a divorce in the following situations:

1. Where the parties have lived apart for five consecutive years but where one spouse was confined in an insane asylum for all or part of that time.<sup>32</sup>

2. Where the parties have lived apart for five consecutive years but where the defendant had no notice that the other spouse intended to cease cohabitation.<sup>33</sup>

It is not clear whether a divorce would be allowed under this statute where the parties continued to live in the same house, but where sexual intercourse was refused.<sup>34</sup>

Query: Would collusion prevent a divorce under this statute where the parties lived apart by agreement for five years?<sup>35</sup>

ELWOOD ROSENBAUM.

#### APPLICATION OF THE HUMANITARIAN DOCTRINE BY THE KENTUCKY COURT OF APPEALS

Since the doctrine of last clear chance is the parent and predecessor of the rule of law dealt with in this note, a preliminary analysis of the last clear chance doctrine seems necessary.

<sup>27</sup> *Garrison v. Garrison*, 31 Ky. L. Rep. 1209, 104 S. W. 980 (1907).

<sup>28</sup> It is submitted that, as the fault of the parties is immaterial under this provision and abandonment is considered more serious than living apart, a divorce should be allowed in this case.

<sup>29</sup> Ky. Stat. (Carroll, 1936) section 2117.

<sup>30</sup> See note 11, *supra*.

<sup>31</sup> See note 18, *supra*.

<sup>32</sup> See note 13, *supra*.

<sup>33</sup> See note 17, *supra*.

<sup>34</sup> Compare *Gates v. Gates*, 192 Ky. 253, 232 S. W. 378 (1921) with *Evans v. Evans*, 247 Ky. 1, 56 S. W. (2d) 547 (1933).

<sup>35</sup> It is submitted that if the statute assumes the parties have lived apart because of their mutual purpose to do so, and if the proposition underlying the statute is that stated in the introduction to this note, collusion would not defeat an action for divorce in this instance.